In the Supreme Court of South Carolina

IN THE ORIGINAL JURISDICTION
OF THE SUPREME COURT

League of Women Voters of South Carolina.....Petitioner

v.

Thomas Alexander, in his official capacity as President of the South Carolina Senate;

Murrell Smith, in his official capacity as Speaker of the South Carolina House of Representatives;

Howard Knapp, in his official capacity as Director of the South Carolina Election Commission .....Respondents

and

Henry McMaster, in his official capacity as the Governor of South Carolina .....Intervenor

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INTRODUCTION

This case presents a novel and important question: does South Carolina's congressional redistricting plan—a plan that Respondents have repeatedly insisted is a partisan gerrymander—violate the South Carolina Constitution? Based on our State Constitution's text, purpose, and history, the answer is a resounding yes.

After the 2020 Census, South Carolina lawmakers reconfigured the State's congressional districts. As those lawmakers swore in court, partisan advantage was the "primary goal" of the congressional redistricting process, and it was a priority to "pull the [F]irst [Congressional District] red."[1] To hit their "political target," Senators instructed their chief cartographer to excise heavily Democratic voting precincts from the First Congressional District (CD1) and move those voters into the Sixth Congressional District (CD6).[2] To quote Respondents' own legal brief: "it was about packing Democratic voters into District 6 to make District 1 more electable . . . with Trump numbers."[3] By manipulating electoral boundaries to move tens of thousands of Democratic voters from CD1 to CD6, lawmakers were able to nullify those voters' influence and ensure that CD1—which had produced competitive elections in 2018 and 2020—would reliably produce a Republican winner for the next decade.

By the end of this process, the results were staggering. Almost 200,000 voters were moved back and forth between CD1 and CD6, more than twice as many as needed to balance their populations. Rather than adopting one of several proposed plans that split

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[1] Senator George E. "Chip" Campsen testified under oath in *S.C. NAACP v. Alexander*, that partisan advantage was the "primary goal" of congressional redistricting. Ex. 1 (*Alexander*, No. 3:21-cv-03302, Trial Tr. 1862:17–18 (Oct. 13, 2022)). In the same trial, Representative Wallace H. "Jay" Jordan testified that a priority of Representatives was to "pull the first red." *Id.* 1773:5-9.

[2] Br. of Appellants at *14–15, *Alexander v. S.C. NAACP*, 2023 WL 4497083 (U.S. 2023) (No. 22-807).

[3] *Id.* (citation omitted).

fewer counties and showed greater fidelity to neutral criteria like compactness, contiguity, and respect for communities of interest, the General Assembly imposed needless and dramatic changes to CD1. As a result, CD1 is no longer anchored in Charleston (where it had been for a century) and no longer contiguous by land. But what the U.S. Supreme Court called a "political gerrymander"[4] was surely effective: the Republican incumbent—who narrowly won her seat in 2020—was easily reelected in CD1 by 14% in 2022 and nearly 17% in 2024, and Republicans, despite comprising about 55% of South Carolina voters, now have an unassailable advantage in 86% of the State's congressional seats.

Respondents' partisan gerrymander violates the South Carolina Constitution four times over. To start, the Constitution's text guarantees "free and open" elections where every qualified elector "shall have an equal right to elect officers." S.C. Const. art. I, §§ 1, 5. More than protecting the right to cast a ballot, the State must ensure that "every elector" is "granted *equal influence* with that of every other elector."[5] The Equal Protection Clause contains a similar guarantee. As this Court has held, "the right to vote is a cornerstone of our constitutional republic,"[6] and under the Equal Protection Clause the "dilution of the weight of a citizen's vote" is just "as nefarious as an outright prohibition on voting."[7] Given those guarantees, the South Carolina congressional redistricting plan—legislation that intentionally and effectively dilutes certain voters' influence—must be invalidated.

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The congressional redistricting plan also violates voters' rights to be free from viewpoint discrimination and to associate with the political party of their choice. Selectively

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[4] *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 21 (2024).

[5] *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95, 97 (1938) (interpreting Article I, Section 10) (emphasis added).

[6] *Bailey v. S.C. Election Comm'n*, 430 S.C. 268, 271, 844 S.E.2d 390, 391 (2020).

[7] *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 451, 633 S.E.2d 482, 486 (2006) (citation omitted).

diluting voters' influence because of "their voting history, their association with a political party, or their expression of political views"[8] is anathema to the principles of free speech, expression, and assembly enshrined in Article I, Section 2 of the South Carolina Constitution. Respondents admit that they instructed their map drawer to identify voters who voted for Joe Biden in the 2020 presidential election and move those voters to a different district so that their vote would matter less. That is viewpoint retaliation, pure and simple. Because voting is core political speech that cannot be limited without triggering strict scrutiny and Respondents have *no* compelling interest in subverting representational democracy, the congressional redistricting plan should be struck down under Article I, Section 2.

Lastly, the congressional redistricting plan tramples on the South Carolina Constitution's command to, wherever possible, keep counties whole. Article VII, Section 13 states that "[t]he General Assembly may at any time arrange the various Counties into . . . Congressional Districts." Courts have construed this clause as reflecting "a substantial state policy favoring drawing congressional districts along county boundaries,"[9] and ruled that "preserving county lines should enjoy a *preeminent role* in South Carolina's redistricting process."[10] Article VII, Section 9, further buttresses Section 13's mandate, instructing that, "Each County shall constitute one election district, and shall be a body politic and corporate." The congressional redistricting plan disregards this constitutional mandate to preserve county boundaries. Rather than enacting one of the several

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[8] *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

[9] *S.C. NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982), *aff'd sub nom. Stevenson v. S.C. State Conf. of NAACP*, 459 U.S. 1025 (1982).

[10] *Burton on Behalf of Republican Party v. Sheheen*, 793 F. Supp. 1329, 1341 (D.S.C. 1992) (emphasis added), *vacated sub nom. Statewide Reapportionment Advisory Comm. v. Theodore*, 508 U.S. 968 (1993), and *vacated sub nom. Campbell v. Theodore*, 508 U.S. 968 (1993).

alternative plans that healed county splits in Charleston, Richland, and Sumter Counties, Respondents enacted a plan that needlessly retained, and even deepened, those fissures. Further, the decision to split those counties was driven entirely by an illegitimate goal of entrenching partisan advantage.

In sum: Respondents distorted democracy by intentionally and admittedly diluting the electoral influence of Democratic voters, and it is this Court's duty to adjudicate Petitioner's constitutional claims. The League of Women Voters of South Carolina (LWVSC) represents members who were selectively moved out of CD1 and whose electoral influence in CD1 was nullified to achieve the artificial partisan bias sought by Respondents. On behalf of itself and its affected members, Petitioner asks the Court to rule that partisan gerrymandering violates the South Carolina Constitution; to strike down the congressional redistricting plan, S.865; to enjoin future congressional elections under that plan; and to order the General Assembly to draw a new congressional redistricting plan that respects our State's Constitution.

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STATEMENT OF ISSUES

Respondents admit that they manipulated the 2021 congressional redistricting plan, S.865, to create and entrench an artificial Republican advantage in CD1. To do so, they radically reconfigured district boundaries to dilute the electoral influence of voters who reside in precincts that supported President Biden in the 2020 presidential election. This raises several issues.

I. Does S.865 violate the Free and Open Elections Clause, S.C. Const. art. I, § 5, by denying voters their "equal right to elect officers"?

II. Does S.865 violate the Equal Protection Clause, S.C. Const. art. I, § 3, by intentionally diluting the electoral influence of voters of a disfavored political party?

III. Does S.865 violate the Freedom of Speech Clause, S.C. Const. art. I, § 2, by intentionally suppressing the electoral influence of voters based on their viewpoints and prior voting history?

IV. Does S.865 violate S.C. Const. art. VII, §§ 9 & 13, that is, the whole-county directive, by needlessly splitting counties for the purpose of entrenching artificial partisan advantage?

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STATEMENT OF THE CASE

Petitioner LWVSC is a nonprofit, nonpartisan membership organization dedicated to empowering voters and defending democracy. LWVSC has over 1,100 members comprising voters from all seven of South Carolina's congressional districts, including members who were reassigned to a different congressional district during the 2021 redistricting cycle based on their past voting history. By packing and cracking LWVSC members based on their voting history, S.865 violates LWVSC's members' rights to free and open elections, equal protection of laws, freedom of speech and assembly, and right to vote and share a representative with the other residents of their counties. Respondents' partisan gerrymander, S.865, especially harms LWVSC members who were moved out of their home districts and into CD6 for the purpose of diluting their electoral influence. Further, LWVSC is directly harmed by Respondents' partisan gerrymander because it suppresses intradistrict political competition, subverts the constitutional promise of popular sovereignty, and erodes political accountability. LWVSC has standing to bring this challenge because "[its] members would otherwise have standing to sue in their own right, the interests at stake are germane to [its] purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014) (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

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On its own behalf and on behalf of its members, Petitioner filed a Petition for Original Jurisdiction and Complaint on July 29, 2024, asking the Court to accept this case in its original jurisdiction. The Complaint was filed against Respondents Thomas Alexander, President of the South Carolina Senate, Murrell Smith, Speaker of the South Carolina House of Representatives, and Howard Knapp, executive director of the South Carolina Election Commission. In substance, the Complaint alleged that Respondents were responsible for enacting and enforcing a congressional redistricting plan that violates

the South Carolina Constitution, and that the Court should permanently enjoin the plan. In their respective returns to the Petition, each Respondent agreed that the Court should accept the matter in its original jurisdiction. Around the same time, Governor McMaster filed a motion to intervene.

On October 3, 2024, the Court granted the Petition for Original Jurisdiction and the Governor's motion to intervene.

STATEMENT OF THE FACTS

Partisan gerrymandering produces a cascade of anti-democratic consequences that undermine the promises of the South Carolina Constitution. As Respondents have admitted, the General Assembly designed the congressional redistricting plan, S.865, to be a partisan gerrymander. The plan blatantly disregards traditional redistricting principles, intentionally and effectively packs and cracks Democratic voters to entrench Republican power, and needlessly divides counties between multiple districts for partisan gain. The result is a lopsided congressional map that strips supreme political power away from the voters, erodes political accountability, and distorts the democratic republic guaranteed by the South Carolina Constitution.

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I. Partisan gerrymandering is a form of anti-democratic political corruption used to entrench one party's political power.

Partisan gerrymandering is "the practice of dividing a geographical area into electoral districts . . . to give one political party an unfair advantage by diluting the opposition's voting strength." GERRYMANDERING, Black's Law Dictionary (12th ed. 2024). It is a form of anti-democratic political corruption that entrenches the influence of one party by "packing" disfavored voters (*i.e.*, voters not in that party) into as few districts as possible or by "cracking" disfavored voters across as many districts as possible. With either method, the goal is to dilute the electoral influence of specific, disfavored voters. In essence, partisan gerrymandering turns democracy on its head—rather than voters using

their ballots to choose their representatives, representatives use the redistricting process to choose their voters. Because redistricting happens only once every ten years, partisan gerrymandering allows politicians to create durable advantages that insulate their outsized influence from demographic or sociopolitical changes.

In an extreme partisan gerrymander, as exists in South Carolina, strategic manipulations of district boundaries make the results of general elections inevitable. Thus, partisan gerrymandering not only distorts the influence of certain voters, but it also suppresses competition and reduces the viable choices available to all voters. In noncompetitive districts, races are decided between primary candidates who then often run unopposed in the general election.

This has several consequences. To start, primary elections draw far fewer voters. In South Carolina, for example, the last eleven statewide primary elections have averaged only 22.44% voter turnout.[11] That means that a much smaller subset of the electorate have a say in the composition of their elected representatives. By elevating the influence of sparsely attended primaries and degrading the importance of general elections, partisan gerrymandering also erodes political accountability and the responsiveness of elected officials. As the U.S. Supreme Court has explained, "a central feature of democracy" is that "candidates who are elected can be expected to be responsive to [the] concerns [of the voters]." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 192 (2014). "Representatives are not to follow constituent orders, but can be expected to be cognizant of and responsive to those concerns. Such responsiveness is key to the very concept of self-governance through elected officials." *Id.* at 227. But by creating inevitable election results and artificially suppressing competition, partisan gerrymandering neutralizes any incentive

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[11] *Voter Turnout in American Elections Since 2000*, States United Democracy Center (July 15, 2024), https://statesuniteddemocracy.org/resources/voter-turnout-since-2000/#Methodology.

politicians have for abiding by the will of their constituents. Political scientist Dr. Kosuke Imai described the relationship between partisan gerrymandering and political responsiveness in this way: "if many lawmakers are in safe seats, guaranteed to win by a relatively comfortable margin, there's less incentive to respond to what voters want."[12]

By destroying political accountability, partisan gerrymandering also erodes a bedrock legal doctrine: the presumptive constitutionality of statutes. Judicial deference to the legislative branch rests on the observation that "the will of the people is expressed in the policy judgments of their elected representatives." *See Planned Parenthood S. Atl. v. State*, 438 S.C. 188, 296 n.72, 882 S.E.2d 770, 828 n.72 (2023) ("*Planned Parenthood I*") (Kittredge, J., dissenting) ("We must never lose sight of this bedrock principle" (referencing S.C. Const. art. I, § 1)). But by manipulating and distorting one party's political power while insulating representatives from electoral accountability, extreme partisan gerrymandering dangerously alienates elected officials from the voters. As a result, policy judgments no longer reflect the will of the people; rather, they reflect the self-serving will of politicians.

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Voters overwhelmingly disfavor political gerrymandering. A 2021 AP-NORC poll found that two-thirds of all respondents felt that "drawing legislative districts that intentionally favor one political party" is a "*major* problem."[13] An additional 26% felt that it is a "minor problem," with only 5% responding that it is "not a problem." Negative views towards partisan gerrymandering are also cross-ideological, with polls showing that Republicans, Democrats, and independent voters share nearly equal disdain for this form

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[12] Christy DeSmith, *Biggest problem with gerrymandering*, The Harvard Gazette (July 5, 2023), https://news.harvard.edu/gazette/story/2023/07/biggest-problem-with-gerrymandering/; *see also* Kenny, et al., *Widespread partisan gerrymandering mostly cancels nationally, but reduces electoral competition*, 120 PNAS 25 (June 13, 2023).

[13] *Public supportive of many voting reforms*, AP-NORC (Apr. 2, 2021), https://apnorc.org/projects/public-supportive-of-many-voting-reforms/?doing_wp_cron=1721954633.5319540500640869140625.

of political corruption. Despite widespread antipathy amongst voters, gerrymandering reform requires lawmakers to legislate against their own political interests—a rare and unlikely occurrence. This is especially true in states like South Carolina that lack avenues of direct democracy for constituents to bypass the self-interest of entrenched political actors. *See Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 642, 528 S.E.2d 647, 651 (1999).

From at least 1962 until 2019, federal courts "consistently adjudicated" partisan gerrymandering claims under the Equal Protection Clause of the Fourteenth Amendment. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986). To state a claim, plaintiffs showed that "a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power,'" and "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 867–68 (M.D.N.C. 2018) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)), *vacated and remanded*, *Rucho v. Common Cause*, 588 U.S. 684 (2019). If a plaintiff satisfied the *prima facie* showing of partisan-vote dilution, the burden shifted to the defendants to prove that the discriminatory effects were "attributable to a legitimate state interest or other neutral explanation." *Id.* at 868.

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But in 2019, despite recognizing the distortive anti-democratic effects of partisan gerrymandering, the U.S. Supreme Court changed course. It concluded that partisan gerrymandering claims are nonjusticiable under the federal Constitution due to the "political question" doctrine that applies to federal courts. *Rucho*, 588 U.S. at 705–07. Writing for the Court, Chief Justice Roberts explained that the Fourteenth Amendment's text did not supply workable standards for federal courts to police the role partisanship

plays in redistricting. Though *Rucho* foreclosed partisan gerrymandering claims under *federal* law, it did not purport to limit the reach of state statutes or constitutions. In fact, it did the opposite: *Rucho* observed that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 719.

Rucho thus turned greater attention to state law as a source of substantive protections from partisan gerrymandering. Some state constitutions explicitly prohibit partisan gerrymandering. *See, e.g.*, Fla. Const. art. III, § 21 ("No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent[.]"); Ohio Const. art. XIX, § 1(C)(3)(a) (prohibiting redistricting plans that "unduly favor[] or disfavor[] a political party or its incumbents"). But even in states without explicit protections, several state high courts—including those in Kentucky, New Mexico, and Pennsylvania—have held that independent provisions of their state constitutions, which are similar to South Carolina's Free and Open Elections Clause, prohibit extreme partisan gerrymandering. *See, e.g.*, *Grisham v. Van Soelen*, 539 P.3d 272, 289 (N.M. 2023) ("We find it inconceivable that the framers of our constitution would consider an election in which the entrenched [political] party effectively predetermined the result to be an election that is 'free and open.'" (referencing New Mexico's Popular Sovereignty and Free and Open Elections Clauses)).

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Because both major political parties are willing to engage in partisan gerrymandering, recent state high court decisions on the justiciability of partisan gerrymandering claims do not break on political grounds. *Compare Grisham*, 539 P.3d 272 (finding a Democratic gerrymander justiciable) *with Graham v. Adams*, 684 S.W.3d 663 (Ky. 2023) (finding a Republican gerrymander justiciable).

II. Respondents set out to enact a partisan gerrymandered map.

In 2021, following the decennial census, the South Carolina General Assembly redrew its House, Senate, and congressional districts. It was the first redistricting cycle

without federal preclearance under Section 5 of the Voting Rights Act.[14] It was also the first redistricting cycle following the U.S. Supreme Court's holding that partisan gerrymandering claims are nonjusticiable in federal court. *See Rucho*, 588 U.S. at 684. After politicians failed to timely pass maps, voters filed "impasse litigation" in October of 2021, asserting that the failure to pass new maps violated their voting rights, and the General Assembly eventually passed reapportionment plans. The plans were signed into law by Governor McMaster on January 26, 2022. From the start, Republican legislators who led on the redistricting effort sought to enact a partisan gerrymander.

The Senate Redistricting Committee first released its "Staff Senate Congressional Plan" in November 2021. Congressman Joe Cunningham, who represented CD1 from 2019 to 2021, criticized the Plan as drawn for the "sole purpose . . . to make it harder for a [R]epublican to lose." Ex. 2 (Nov. 29, 2021, Senate Judiciary Redistricting Subcomm. Tr. 13:16–20). The House Redistricting Committee then released its own congressional plan (the "House Staff" plan), which largely tracked the 2011 congressional districts but moved the predominantly Republican Beaufort County from CD1 to CD2. *See* Ex. 3 (Defs.' Proposed Findings of Fact, *Alexander*, No. 3:21-cv-03302, ¶¶ 118–119 (Nov. 10, 2022), ECF No. 480). The House Staff plan was widely criticized by Republicans because it left CD1 too competitive for a potential Democratic candidate. *Id.* ¶¶ 140–142.

In response, the Chair of the House Redistricting Committee, Representative Jordan, sought to redraw a map with at least 53.5% Republican vote share in CD1. *Id.* ¶ 159. The revised plan, "House Staff Plan Alternative 1," more closely mirrored the Staff

[14] Before the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), covered jurisdictions (i.e., those with a history of racially discriminatory voting restrictions) were required to "preclear" their voting laws with the federal government before implementation to ensure the laws did not discriminate against voters of color. South Carolina was an original "covered" jurisdiction. *See* Determination of the Att'y Gen., 30 Fed. Reg. 9897, 9897 (Aug. 7, 1965). It was accordingly required to submit its redistricting plans for preclearance between 1965 and 2013.

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Senate Congressional Plan. One member of LWVSC criticized the plan as an "obvious racial [and] partisan gerrymander." Ex. 4 (Dec. 29, 2021 House Judiciary Redistricting Subcomm. Tr. 7:13–15). House Staff Plan Alternative 1 was advanced to the full House soon after.

When House Staff Plan Alternative 1 was introduced as part of S.865, Representative John King, a Democrat, explained the Plan reflected "party driven lines" that were designed "make sure that no Democrat" could win. Ex. 5 (Jan. 12, 2022 House Judiciary Redistricting Subcomm. Tr. 95:23–96:6). Representative King said it was "dangerous" to produce "a congressional map that does nothing but empower[] one particular party for the next 10 years." *Id.* 92:11–17. Despite these objections, the House adopted and transmitted to the Senate S. 865, which included House Staff Plan Alternative 1.

In January 2022, the Senate Redistricting Subcommittee held hearings on two additional proposed maps, Senate Amendment 1 and Senate Amendment 2, the latter of which was later modified to become Senate Amendment 2a. Senate Amendment 1 was based on the Staff Senate Congressional Plan and House Staff Plan Alternative 1 (which itself was based on the initial Staff Senate Congressional Plan). *See* Ex. 6 (Pls.' Proposed Findings of Fact, *Alexander*, No. 3:21-cv-03302, ¶¶ 534, 536 (Nov. 10, 2022)). A LWVSC member made clear to the Subcommittee that CD1 as drawn in Senate Amendment 1 "receive[d] poor ratings in proportionality, compactness, efficiency, and other standard redistricting measures." Ex. 7 (Jan. 13, 2022 Senate Judiciary Redistricting Subcomm. Tr. 11:4–7). Nevertheless, the Senate Judiciary Committee adopted Senate Amendment 1.

At a full Senate hearing on the Plan, Democrats underscored the plan was a partisan gerrymander that was designed to make CD1 uncompetitive. Senator Marlon Kimpson expressed dismay that the Plan would "weaken[] the people and the voices of South Carolina." Ex. 8 (Jan. 20, 2022 Senate Floor Debate Tr. 92:7–8). The Senate adopted

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the Senate Amendment 1 map as S.865. Soon after, S.865 was then returned to and approved by the House and signed into law by the Governor.

III. The congressional redistricting plan, S.865, is an intentional partisan gerrymander.

A. Respondents have openly and repeatedly insisted that S.865 is a partisan gerrymander.

After South Carolina enacted its statewide redistricting plans, plaintiffs in the federal impasse litigation amended their complaint to allege that the House and congressional redistricting plans violated the Fourteenth and Fifteenth Amendments. Plaintiffs asserted that those redistricting plans were unlawful racial gerrymanders, *see Shaw v. Reno*, 509 U.S. 630 (1993), and the product of intentional racial vote dilution, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The claims against the state redistricting plan settled and provoked the passage of a new House map. *See* Settlement Agreement and Release, *Alexander*, No. 3:21-cv-03302 (May 6, 2022), ECF No. 266-1. But the claims against the congressional plan proceeded to trial, where defendants (largely the same parties as Respondents here) argued that the movement of voters between districts was not motivated by race, but by a desire to entrench a 6-1 Republican supermajority in the South Carolina congressional delegation. *See S.C. NAACP v. Alexander*, 649 F. Supp. 3d 177, 188–89 (D.S.C. 2023), *overruled by Alexander*, 602 U.S. 1.

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At trial, much of the testimony focused on CD1, which, because of demographic changes along the coast, produced competitive elections in 2018 and 2020. Senator Shane Massey, for example, testified at trial that partisanship was "one of the most important factors" for the reconfiguration of CD1. Ex. 1 (*Alexander*, No. 3:21-cv-03302, Trial Tr. 1562:3–4 (Oct. 12, 2022)); *see also Alexander*, 602 U.S. at 13 (crediting testimony). Senator Campsen, lead sponsor of the enacted congressional redistricting plan, testified that after competitive elections in 2018 and 2020, Senate Republicans would *never* have passed a plan

without ensuring it cemented Republican advantage in CD1 and that his "primary goal was to draw a Republican district." Ex. 1 (*Alexander*, No. 3:21-cv-03302, Trial Tr. 1862:17–18 (Oct. 13, 2022)); *see* Ex. 3 (Defs.' Proposed Findings of Fact, *Alexander*, ¶¶ 451–52). Will Roberts, the lead cartographer for the Senate and the principal creator of the enacted congressional plan, testified that in drawing the district he relied "one hundred percent" on data regarding the "partisan lean" of the district. *Alexander*, 649 F. Supp. 3d at 189. And as Respondents later emphasized in the U.S. Supreme Court, text messages showed that Senate Republicans set a "political target" of "at least a 53.5% Republican vote share in District 1." *Alexander*, Br. of Appellants, 2023 WL 4497083, at *14–15.

After a two-week trial, a three-judge panel unanimously held that CD1 was an unconstitutional racial gerrymander. The panel started by crediting Defendants' claim that partisanship was Defendants' primary motivation for the movement of voters, *Alexander*, 649 F. Supp. 3d at 187–88 (finding, as a matter of fact, that "Republican majorities in both bodies sought to create a stronger Republican tilt to Congressional District No. 1."), and finding that the plan made "a mockery" of traditional redistricting principles in CD1, *id.* at 190. It then went on to find that plaintiffs' expert evidence disentangling race from party, coupled with the conspicuous movement of more than 30,000 Black voters in Charleston County, sufficiently proved that defendants used race as a proxy for partisanship in violation of the Fourteenth Amendment. *Id.* at 193.

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Defendants appealed the ruling to the U.S. Supreme Court, where they again insisted that they reconfigured CD1 to entrench Republican political power and protect it against demographic shifts along South Carolina's coast. *See, e.g.*, Jurisdictional Statement at 4, *Alexander v. S.C. NAACP*, 2023 WL 2265678 (U.S. 2023) (No. 22-807) ("the Enacted Plan follows partisan patterns to move heavily Democratic areas of Charleston County out of District 1"), 27 ("the Enacted Plan is the only plan that keeps District 1 majority-Republican and maintains the 6-1 partisan composition in the congressional delegation"). By the time the case reached oral argument, "[e]verybody seem[ed] to take as given that

the legislature [sought] . . . a partisan gerrymander." Oral Arg. Tr. at 107, *Alexander v. S.C. NAACP*, 2023 WL 9375559 (U.S. 2023) (No. 22-807) (JUSTICE GORSUCH: "We start with that as a given.").

Defendants' "partisan-gerrymandering defense" prevailed at the U.S. Supreme Court and resulted in a reversal of the three-judge panel's decision. Indeed, the Supreme Court majority's conclusion that the challenged congressional map was "a political gerrymander" was key to its decision. *Alexander*, 602 U.S. at 19–21. Throughout the opinion, the Supreme Court rejected each of the trial court's findings that redistricting choices were made on account of race, concluding instead that they were made with partisan intent. *Id.* The Supreme Court flatly concluded that "[t]he fact of the matter is that politics pervaded the highly visible mapmaking process from start to finish." *Id.* at 25. These conclusions led to a reversal of the trial court decision as to plaintiffs' federal racial gerrymandering claim, but the Court made clear that the state's "political gerrymander," *id.* at 21, is only permissible "as far as the *Federal* Constitution is concerned," *id.* at 6 (emphasis added).

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B. The congressional redistricting plan is an objectively extreme partisan gerrymander.

Consistent with Respondents' repeated claims, and the U.S. Supreme Court's affirmation, the congressional redistricting plan artificially suppresses competition, wastes votes, and creates extreme and disproportionate electoral advantage for South Carolina Republicans. Both standard partisan gerrymandering metrics and Respondents' clear disregard for traditional districting principles bear this out.

1. Empirical metrics show this is an extreme partisan gerrymander.

Partisan-gerrymandering analyses show that South Carolina's congressional plan is extremely skewed in favor of Republicans. According to analyses published by Planscore.org, a website maintained in partnership with the Harvard Election Law

Clinic,[15] South Carolina's congressional redistricting plan is a national outlier under each of Planscore's four measures of bias: efficiency gap, partisan symmetry, mean-median, and declination. Those metrics are "broadly accepted by political scientists to measure partisan bias," *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 411 (Ohio 2022), and are regularly relied upon by courts to evaluate the same, *see, e.g.*, *Carter v. Chapman*, 270 A.3d 444, 470–77 (Pa. 2022) ("[W]e deem it appropriate to evaluate proposed plans through the use of partisan fairness metrics to ensure that all voters have 'an equal opportunity to translate their votes into representation.'" (quoting *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018))). Of those metrics, South Carolina's congressional plan is especially egregious when it comes to packing and cracking Democratic voters—a phenomenon captured by the "efficiency gap" metric. The efficiency gap metric is designed to evaluate the number of "wasted votes" assigned to each party. If a redistricting plan packs and cracks voters of one party at a much higher rate, the efficiency gap will depict that result as a high negative number (biased in favor of Democrats) or high positive number (biased in favor of Republicans). The congressional redistricting plan produces an efficiency gap score of 14%—making it one of the most egregious gerrymanders in the country.[16]

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Expert analyses done by Jonathan Mattingly and Greg Herschlag, two mathematicians at Duke University, further establish that the congressional redistricting plan is exceedingly biased. Drs. Mattingly and Herschlag produced ensembles of

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[15] *What is PlanScore?*, PlanScore, https://planscore.org/about/ (last visited Nov. 19, 2024).

[16] Darla Cameron, *Here's how the Supreme Court could decide whether your vote will count*, Wash. Post (Oct. 4, 2017), https://www.washingtonpost.com/graphics/2017/politics/courts-law/gerrymander/ (explaining how the efficiency gap metric works and quoting the metric's creator as saying that "[t]here aren't many plans that are equivalently egregious as the Wisconsin map" that scored between 10% and 13%).

computer-generated congressional redistricting plans. Compl. ¶ 167. Every ensemble contained thousands of sample plans that each obeyed the state's public redistricting criteria, including contiguity, equipopulation, county preservation, compactness, and adherence to the Voting Rights Act. *See id.*; *see also id.* ¶¶ 39–61 (discussing the House and Senate's redistricting criteria). All plans that split more counties than the enacted plan were excluded from the ensemble. *Id.* ¶ 167. By generating simulated redistricting plans based on South Carolina's actual voting precincts, this analysis supplements other metrics (like partisan symmetry, efficiency gap, etc.) by additionally accounting for the existing geographic distribution of Republican and Democratic voters across the state.

Compared to the Mattingly-Herschlag computer-generated ensembles, the enacted congressional redistricting plan leaps out as an intentional partisan gerrymander. The overwhelming majority of ensemble plans produce five Republican districts, one Democratic district, and one competitive or slightly Democratic-leaning district. *Id.* ¶ 167. By contrast, it is only through the contortions in the enacted congressional redistricting plan that lawmakers managed to draw six strongly Republican districts. Using Trump/Biden vote share from the 2020 Presidential Election (which is what Respondents used to create the enacted plan), the Matting-Herschlag ensembles prove to a near certainty that the congressional redistricting plan subordinates traditional redistricting principles to partisan advantage. *Id.* ¶¶ 166–68. That outcome objectively confirms what Respondents have openly admitted—that the plan is the result of deliberate and extreme partisan gerrymandering.

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2. Respondents' partisan gerrymander disregards traditional redistricting principles.

Beyond the statewide bias created by Respondents, specific district boundaries within the congressional redistricting plan also show that traditional redistricting principles were disregarded to facilitate the packing and cracking of Democratic voters. The needless splitting of Charleston, Richland, and Sumter Counties offers a textbook

example of subordinating traditional redistricting principles to partisan goals. Notably, Respondents considered and rejected Senate Amendment 2a, which kept whole Charleston and Beaufort Counties in CD1—and split six counties, instead of the ten that Senate Amendment 1 split. *See* Ex. 7 (Jan. 13, 2022 Senate Judiciary Redistricting Subcomm. Tr. 20:11–13, 21:21–25 (Testimony of Robert Oppermann)).

The most glaring example is Respondents' movement of voters between CD1 and CD6. Unlike the "least change" approach that Respondents claimed to follow across most of the state (*i.e.*, their purported attempt to change the previous decade's maps as little as possible), Respondents dramatically reconfigured CD1 to fit their partisan goals, despite strong community pressure to reunite Charleston County into CD1. Senator Richard A. "Dick" Harpootlian testified that "everybody from the Charleston area was outraged" and "[a]lmost everybody [the Senate Committee] heard from wanted Charleston kept whole." Ex. 1 (*Alexander*, No. 3:21-cv-03302, Trial Tr. 87:15–20 (Oct. 7, 2022)). Representative Gilda Cobb-Hunter called it "totally unreasonable to expect people in North Charleston" to share a community of interest with Richland County voters. Ex. 1 (*Alexander*, No. 3:21-cv-03302, Trial Tr. 141:6–7 (Oct. 3, 2022)). Ignoring input from the public, Respondents stretched CD6 even *deeper* into Charleston County to shuttle more Democrats into CD6.

In a move that is intolerable under traditional principles, the enacted congressional redistricting plan now puts the Charleston Peninsula into the same congressional district as downtown Columbia. For the first time in a century, Charleston is no longer the anchor of CD1; instead, it is a moat that divides voters in Mount Pleasant and Berkley County from the rest of CD1 which reaches down the coast to the south. Even the Charleston Port Authority, one of the longstanding economic engines of Charleston, is cleaved into two districts by the enacted congressional redistricting plan.

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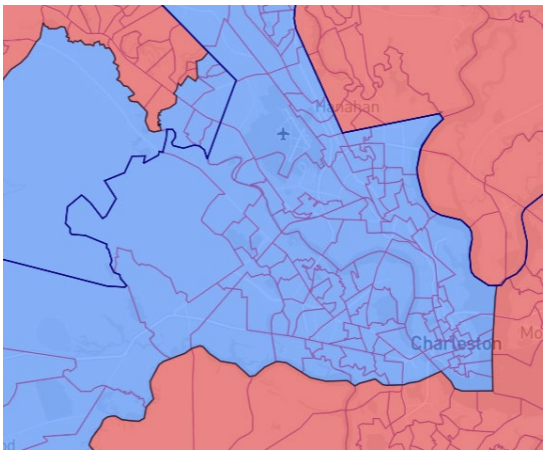
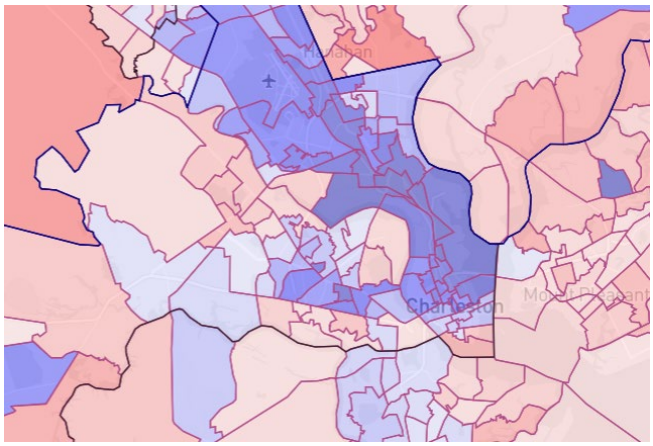


CD1/CD6 Border in Charleston



Precinct-by-Precinct Partisan Data

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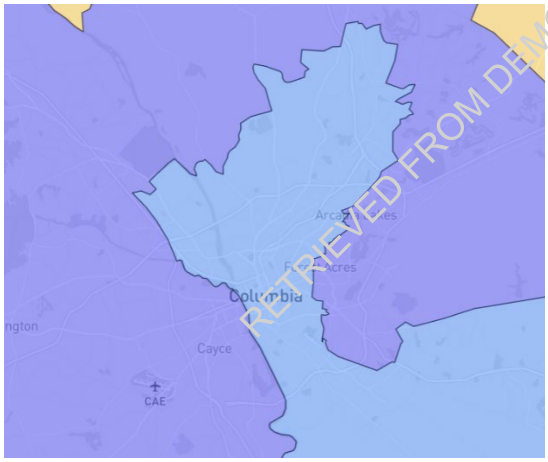
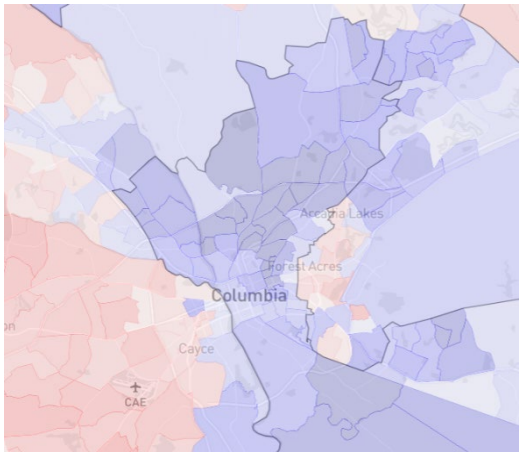
But CD1 is not the only part of the state that displays the funny shapes that are emblematic of gerrymanders. The "hook" in Richland County needlessly splits the City of Columbia and clearly follows partisan lines.

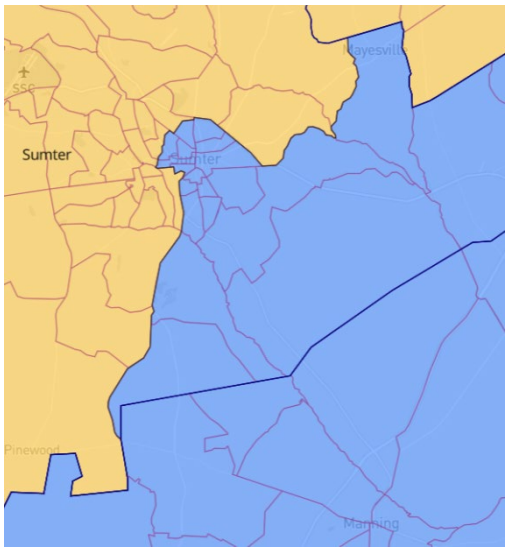


CD6/CD2 Boundary in Richland County

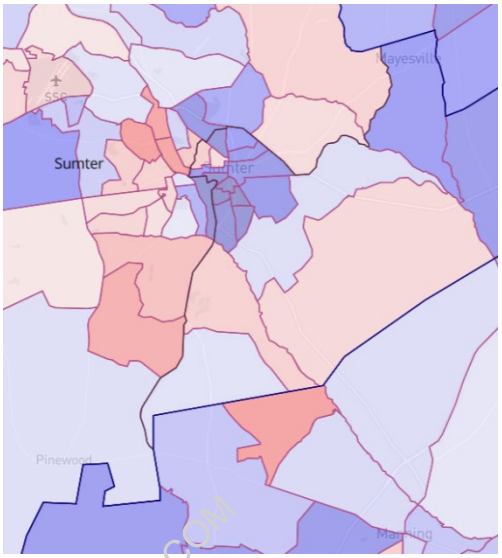


Precinct-by-Precinct Partisan Data

CD6 also reaches in and grabs Democratic voters in the heart of Sumter County to pack those voters into a district where their influence is suppressed.



CD6/CD5 Boundary in Sumter County



Precinct-by-Precinct Partisan Data

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Unlike with CD1, Respondents have not confessed to subordinating traditional redistricting principles to partisanship in their design of CD2 and CD5. That said, the apparent lack of interest in maintaining compactness, disregard for communities of interest (including city and county borders), and conspicuous attention to partisan lean all make a compelling case that those areas were also drawn with an intent to disadvantage non-Republican voters.

STANDARD OF REVIEW

This Court is the last and highest authority on the meaning of the South Carolina Constitution. *S.C. Pub. Int. Found. v. Jud. Merit Selection Comm'n*, 369 S.C. 139, 142, 632 S.E.2d 277, 278 (2006). It reviews the constitutionality of state laws *de novo*. *Powell v. Keel*, 433 S.C. 457, 462, 860 S.E.2d 344, 346 (2021). If a party overcomes the presumption of constitutionality by proving "beyond a reasonable doubt that . . . the statute is unconstitutional," then it is the Court's "solemn duty" to strike it down. *Eidson v. S.C. Dep't of Educ.*, 444 S.C. 166, 176, 906 S.E.2d 345, 350 (2024) (striking down portions of Education Scholarship Trust Fund under S.C. Const. art. XI, § 4); *see also, e.g.*, *Powell*,

433 S.C. at 472, 860 S.E.2d at 351–52 (striking down portions of Sex Offender Registry Act under S.C. Const. art. I, § 3); *Joytime Distrs. & Amusement Co.*, 338 S.C. at 642, 528 S.E.2d at 651 (striking down portion of referendum on video game machines under S.C. Const. art. III, § 1).

ARGUMENT

The South Carolina Constitution is no mere adjunct to the federal Constitution—it contains the unique and enforceable promises of a separate sovereign. *See, e.g.*, Jeffrey S. Sutton, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 16–21 (2018) ("State courts have authority to construe their own constitutional provisions however they wish."). This Court has final and exclusive responsibility for interpreting our State Constitution and ensuring that its mandates and prohibitions are enforced. *See, e.g.*, *Murdock v. City of Memphis*, 87 U.S. 590, 611 (1874); *S.C. Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278 ("[T]his Court [is the] ultimate interpreter of the Constitution.").

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As summarized above, South Carolina's congressional redistricting plan deliberately manipulates district lines, devaluing the voting power of disfavored voters and aggrandizing others' in order to achieve election outcomes that favor the state's entrenched political party. As other courts have held, "[i]n such a scenario, the will of the people would come second to the will of the entrenched party, and the fundamental right to vote in a free and open election . . . [is] transformed into a meaningless exercise." *Grisham*, 539 P.3d at 284. In South Carolina, this is evident in both a statewide and district-specific context.

I. Partisan gerrymandering violates the South Carolina Constitution.

The extreme partisan gerrymander that the Respondents crafted and enacted violates the South Carolina Constitution in four distinct ways. *First*, the congressional redistricting plan violates the Free and Open Elections Clause, which this Court has

interpreted as requiring "every elector" be "granted equal influence with that of every other elector." *Cothran v. W. Dunklin Pub. Sch. Dist. No. 1-C*, 189 S.C. 85, 200 S.E. 95, 97 (1938) (interpreting S.C. Const. art. I, § 5).

Second, it violates South Carolina's Equal Protection Clause and its mandate that "all persons be treated alike under like circumstances and conditions." *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986) (interpreting S.C. Const. art. I, § 3).

Third, it violates voters' freedoms of speech and assembly by diluting the electoral power of certain voters because of the political viewpoint and party affiliation expressed by their ballot. *See City of Rock Hill v. Henry*, 244 S.C. 74, 76, 135 S.E.2d 718, 719 (1963).

Fourth, by needlessly splitting counties to serve base partisan goals, the congressional redistricting plan violates Article VII, Section 13 of the South Carolina Constitution and its "substantial state policy favoring drawing congressional districts along county boundaries." *S.C. NAACP v. Riley*, 533 F. Supp. 1178, 1180 (D.S.C. 1982) (citing S.C. Const. art. VII, § 13); *see also* S.C. Const. art. VII, § 9 (instructing that "[e]ach county shall constitute one election district"). Though each argument provides a separate basis for relief, the sum of these arguments shows that extreme partisan gerrymandering is anathema to the foundational promises and core structure of South Carolina's constitutional republic.

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A. Respondents' partisan gerrymander violates the Free and Open Elections Clause.

The South Carolina Constitution guarantees "free and open" elections, where "every inhabitant . . . shall have an equal right to elect officers." S.C. Const. art. I, § 5. South Carolina is not alone in promising its citizens "free and open" elections. And persuasively, every state high court that has interpreted an analogous "free and open" or "free and equal" elections clause has held that it contains enforceable protections against extreme partisan gerrymandering. *E.g.*, *League of Women Voters of Pa.*, 178 A.3d at 814

("[A]nalysis of the Free and Equal Elections Clause . . . leads us to conclude the Clause should be given the broadest interpretation, one which governs all aspects of the electoral process, and which provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so."); *Graham*, 684 S.W.3d at 683 ("[A] claim that an apportionment plan is unconstitutionally partisan may be considered by the judiciary without violating the political question doctrine[.]"); *Grisham*, 539 P.3d at 289 ("We find it inconceivable that the framers of our constitution would consider an election in which the entrenched party effectively predetermined the result to be an election that is 'free and open.'" (referencing N.M. Const. art. II, § 8)).

Here, the text, history, precedent, and purpose of South Carolina's Free and Open Elections Clause compel the same result.

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1. Article I, Section 5 of the South Carolina Constitution prohibits partisan gerrymandering.

Unlike statutes, constitutional provisions do not enumerate every mandate and prohibition. *Ansel v. Means*, 171 S.C. 432, 436, 172 S.E. 434 (1934) ("It would not be practicable, if possible, in a written constitution to specify in detail all of its objects and purposes."). To the contrary, "constitutional powers are often granted or restrained in general terms from which implied powers or restraints necessarily arise." *Id.* Thus, to interpret Article I, Section 5, the Court must look to its text and history, with special care to construe its meaning "in the light of the history of the times in which it was framed, and with due regard to the evil it was intended to remedy." *Duncan v. Rec. Pub. Co.*, 145 S.C. 196, 143 S.E. 31, 69 (1927) (quoting *Kirkland v. Allendale Cnty.*, 128 S.C. 541, 123 S.E. 648, 650 (1924)). That history condemns partisan gerrymandering.

The Constitution of 1868 was the first in state history to require elections be "free and open." Before that time, voting in South Carolina remained limited to white men who

owned property or who paid fifty pounds in taxes.[17] It was not until Reconstruction that South Carolina embraced a more pluralistic approach to representational democracy.[18]

In January of 1868, Black and white delegates from across South Carolina gathered in Charleston to draft a new state constitution. The resulting document extended the franchise "without distinction of race, color, or former condition," S.C. Const. of 1868, art. VIII, § 2, and permitted any eligible voter to hold public office. The Constitution of 1868 was the first in South Carolina history "organized on the great acknowledged principles of Democratic Republicanism,"[19] the first intended to "secure to every man . . . an equal share of political rights,"[20] and the first to be ratified by the voters—a majority of whom were Black. Relevant here, it was also the first to guarantee "free and open" elections.

By adding the Free and Open Elections Clause, the Constitutional Convention of 1868 adopted specific pro-democracy language long used in other state constitutions. *See* S.C. Const. of 1868, art. I, § 31; *see also* Brett Graham, *"Free and Equal": James Wilson's Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts*, 85 Alb. L. Rev. 799, 801–02 (2022) (tracing the shared philosophical roots of "free and open" and "free and equal" elections clauses), 818–19 (collecting cases). Because the clause was added in response to the anti-democratic impulses of the Antebellum South,[21] it

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[17] W. Lewis Burke, *Killing, Cheating, Legislating, and Lying: A History of Voting Rights in South Carolina After the Civil War*, 57 S.C. L. Rev. 859 (2006).

[18] *Id.* at 861–62; *see also* An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, 428 (1867).

[19] Opening Remarks of Convention President A.G. Mackey, *Proceedings of the Constitutional Convention of South Carolina*, p.17 (January 15, 1868) (available at: https://archive.org/details/proceedingsofcon00sout).

[20] *Id.* at 18.

[21] *See id.* at 16 ("In the call for the five South Carolina Conventions which have preceded it, and which were held in 1776, in 1777, in 1790, in 1860, and in 1865, . . . the noble

must be construed as maximally protective of pluralistic democracy; that is, it must be given an effect that "suppress[es] the mischief at which it was aimed." *Duncan*, 145 S.C. 196, 143 S.E. at 69. In full, South Carolina's new Free and Open Elections Clause provided:

> All elections shall be free and open, and every inhabitant of this Commonwealth possessing the qualifications provided for in this Constitution, shall have an equal right to elect officers and be elected to fill public office.

S.C. Const. of 1868, art. I, § 31.

Textually, South Carolina's Free and Open Elections Clause goes well beyond the simple "free and open" or "free and equal" clauses already found sufficient to prohibit partisan gerrymandering in other states. *See Grisham*, 539 P.3d at 282 (constitutional guarantee of "free and open" elections interpreted to mean that each "vote, when cast, shall have the same influence as that of any other voter." (quoting *Preisler v. Calcaterra*, 243 S.W.2d 62, 64 (Mo. 1951))); *see also Graham*, 684 S.W.3d at 684 (holding that Kentucky's "free and equal" clause requires that each vote "have the same influence as that of any other voter"). Now found in Article I, Section 5, this Court has interpreted our Free and Open Elections Clause to contain three distinct guarantees.

First, it requires "free and open" elections; that is, elections that are "public and open to all qualified electors alike." *Cothran*, 189 S.C. 85, 200 S.E. at 97. Second, it clarifies that the qualifications "to elect" and "be elected" are coextensive; that is, that "every qualified voter is eligible 'to any office which now is, or hereafter shall be, elective by the people . . .' unless he labors under some one of the disabilities mentioned in the constitution." *State v. Williams*, 20 S.C. 12, 16 (1883). And third, it demands that each qualified voter has an "equal right to elect officers"—that is, "the vote of *every elector*

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doctrine that governments were constituted for the good of the whole, was substituted that anti-republican one, that they were intended only for the benefit of one class at the expense of another.").

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must be granted equal influence with that of every other elector." *Cothran*, 189 S.C. 85, 200 S.E. at 97 (emphasis added). Because they originate in the text of the State Constitution, these guarantees are "mandatory and prohibitory," S.C. Const. art. I, § 23, and enforceable in court, S.C. Const. art. I, § 9 (Remedy Clause). *See Cent. R.R. & Banking Co. v. Ga. Constr. & Inv. Co.*, 32 S.C. 319, 11 S.E. 192, 203 (1890) (holding that "the object of" the Remedy Clause is "to secure to the inhabitants of the state, for which the constitution was made, access to the courts for redress of any injury which they may have received"); *Doe v. Am. Nat'l Red Cross*, 790 F. Supp. 590, 594 (D.S.C. 1992) (conceptualizing the Remedy Clause as a "constitutional right of access to the courts of South Carolina for [an] alleged wrong").

The Court's application of Article I, Section 5 lends further support. In a series of cases in the 1930s, the Court repeatedly invoked State constitutional provisions, including the Free and Open Elections Clause, to hold that party affiliation (or lack thereof) cannot abridge political influence. *See, e.g.*, *Cothran*, 189 S.C. 85, 200 S.E. at 97; *State v. Huntley*, 167 S.C. 476, 166 S.E. 637, 639–40 (1932); *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338, 342 (1932). Taken together, these cases teach that our State's Constitution prohibits legal manipulations that would curb voters' right to an equal say in their government based on partisan grounds.

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First was *Gardner v. Blackwell*, 167 S.C. 313, 166 S.E. 338 (1932). There, Republican candidates for federal office challenged the "custom and practice" of providing voters with two different general election ballots—one with Republican candidates for office and the other with Democratic candidates. Though the Court rejected many elements of the petitioners' claims, it agreed that partisan ballots were unconstitutional because they denied eligible voters "who are not members of the Democratic or Republican Parties" the "free exercise of the right of suffrage." *Id.* at 342 (citing S.C. Const. art. II, § 15).

In *State v. Huntley*, 167 S.C. 476, 166 S.E. 637 (1932), the Court then evaluated a state law that allowed the election of school board members "according to the rules applicable to primary elections." *Id.* at 639. The Court struck down the law under the Free and Open Elections Clause, explaining that the use of primary election rules—which imposed additional qualifications on voters beyond those contained in the State Constitution—would unconstitutionally deny politically unaffiliated voters the "equal right to elect officers." *Id.* at 639–40. Put another way, the act would have "deprive[d] all those citizens . . . who do not have their names [on] the club roll of some political party" of "the right to vote in such [an] election . . . although they possess the qualifications of suffrage." *Id.* After *Gardner*, the Court continued to strike down decisions made by means of primary-election mechanisms, finding that they violate the constitutional rights of qualified voters to meaningfully participate in the democratic process. *See, e.g.*, *Ansel v. Means*, 171 S.C. 432, 172 S.E. 434, 435 (1934) (striking down law permitting issuance of bonds "if a majority of the voters . . . [in] the Democratic primary were in favor of it").

In *Cothran v. W. Dunklin Public School District No. 1-C*, 189 S.C. 85, 200 S.E. 95 (1938), the Court again addressed a similar issue. There, petitioners challenged a state law allowing the issuance of school bonds upon a majority vote of "such electors as return real or personal property for taxation and who exhibit their tax receipts and registration certificate." *Id.* at 95. The Court sustained the challenge, noting that "[t]he Constitution does not . . . anywhere provide" that a voter "must be the owner of property, real or personal." *Id.* at 96. Citing the Free and Open Elections Clause, the Court explained:

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> Under such a guaranty the right to vote, as the words expressly state, must be maintained absolutely free, and *the vote of every elector must be granted equal influence with that of every other elector*. To be free means that the voter shall be left in the untrammeled exercise, whether by civil or military authority, of his right or privilege; that is to say, no impediment or restraint of any character shall be imposed upon him either directly or indirectly whereby he shall be hindered or prevented from participation at the polls.

Id. at 97 (quoting 9 R.C.L., § 8, p. 984) (emphasis added). Applying those "established principles of law," the Court struck down the Act, holding that because the Act "adds to the law" regarding eligibility for voting, it "deprives voters . . . of their constitutional rights of suffrage." *Id.* at 97.

Together, the 1930s elections cases announce constitutional principles that are irreconcilable with partisan gerrymandering. By deliberately drawing districts to create specific partisan outcomes, Respondents have devised a more sophisticated method of restricting electoral influence to one political party. But worse than the partisan ballots in *Gardner*, which denied the rights of "Socialists, Prohibitionists, Farm Laborites, and independent voters," modern gerrymandering forces voters to choose between candidates within a *single* political party. 167 S.C. 313, 166 S.E. at 342. A legislative map enacted by means of partisan gerrymandering thereby operates much like the act challenged in *Huntley*. There, a state law allowed election administrators to exclude certain voters because of their political affiliation. Here, Respondents accomplish the same thing by drawing legislative districts in a manner designed to suppress inter-party competition and ensure a single partisan outcome. *See supra*, Statement of the Facts, Part I (explaining that in gerrymandered districts, "the results of general elections [are] inevitable" and "races are decided between primary candidates who then often run unopposed in the general election."). In a no less absolute sense, Respondents are denying voters of all but a single party "an equal vote in the election of officers." *Huntley*, 167 S.C. 476, 166 S.E. at 639.

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2. Enforceable standards exist under Article I, Section 5 of the South Carolina Constitution.

To protect "free and open" elections and enforce the "equal right to elect officers," S.C. Const. art. I, § 5, the Court must fashion a test for determining whether a redistricting plan violates voters' right to exercise "equal influence" over elections. *Cothran*, 189 S.C. 85, 200 S.E. at 97. Fortunately, the Court need not invent a test from scratch—it may easily look to what other state courts have already done. Indeed, relying on analogue "free elections" provisions, other courts have asserted a robust and adaptable role for the judiciary as a bulwark against undue partisan gerrymandering.

For example, in fashioning a test under its "Free and Equal Elections Clause," the Pennsylvania Supreme Court started with the observation that neutral redistricting criteria like compactness, contiguity, and preserving county, city, and municipal boundaries "have, as a general matter, been traditionally utilized to guide the formation of . . . legislative districts." *League of Women Voters of Pa.*, 178 A.3d at 814. The court further reasoned that because those factors are "fundamentally impartial in nature, their utilization reduces the likelihood of the creation of congressional districts which confer on any voter an unequal advantage . . . as prohibited by Article I, Section 5." *Id.* at 816. As a result, the court held that compliance with "these neutral benchmarks" "substantially reduces the risk that a voter in a particular congressional district will unfairly suffer the [vote] dilution," and thus forms a "particularly suitable . . . measure [for] assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice." *Id.*; *see also id.* at 817 ("[N]eutral criteria provide a 'floor' of protection . . . against [vote] dilution [in redistricting]."). In conclusion, the court held that where those criteria are "subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage, a congressional redistricting plan violates" the State's constitution. *Id.* at 816–17.

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Subordination of neutral redistricting criteria is one way to prove partisan gerrymandering, but it "is not the exclusive means by which a violation of [the Free and Equal Elections Clause] may be established." *Id.* at 817. As the Pennsylvania Supreme Court presciently acknowledged, "advances in map drawing technology" may allow mapmakers to seemingly follow neutral criteria while nonetheless "unfairly dilut[ing] the power of a particular group's vote." *Id.* In such a case, courts may look to established metrics for quantifying partisan bias "to allow for objective evaluation of proposed districting plans to determine their partisan fairness." *Carter*, 270 A.3d at 470. These metrics are reasoned, accepted, and well understood. Some, for example, "attempt to ascertain a map's responsiveness to voters, evaluating whether a party with a majority of votes is likely to win a majority of seats, or whether it is likely to produce 'anti-majoritarian' results, without focus on [] proportionality of representation." *Id.* Other metrics "measure whether and to what extent a map favors one party." *Id.* What they have in common is that they have aided courts (like Pennsylvania's,[22] Kentucky's,[23] Ohio's,[24] and New York's[25]) to ascertain whether (or not) a redistricting plan slips the bounds of fairness

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[22] *Carter*, 270 A.3d at 470 ("[W]e deem it appropriate to evaluate proposed plans through the use of partisan fairness metrics to ensure that all voters have an equal opportunity to translate their votes into representation.") (citation omitted).

[23] *Graham*, 684 S.W.3d at 683–84 (relying on simulation analysis to conclude that Kentucky's congressional redistricting plan is *not* unconstitutionally partisan); *see also id.* at 687 (comparing evidence that Republicans would win 60/100 seats in a hypothetical 50-50 election with evidence of "the realities of Kentucky's political geography").

[24] *League of Women Voters of Ohio*, 192 N.E.3d at 413 ("Although respondents have presented evidence showing that Ohio's political geography and [] map-drawing requirements . . . may naturally lead to a district map's favoring the Republican candidates, the evidence shows that these factors did not dictate as heavy a partisan skew as there is in the adopted plan.").

[25] *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1371 (N.Y. App. Div. 2022), *aff'd as modified*, 38 N.Y.3d 494 (2022) (relying on "computer simulation accepted in other jurisdictions and data-driven metrics in order to conclude that the enacted 2022 congressional map was drawn to disfavor competition and favor democrats").

that constitutional provisions like South Carolina's Free and Open Elections Clause impose.

As with Pennsylvania's Free and Equal Elections Clause, "the overarching objective" of South Carolina's Free and Open Elections Clause "is to prevent dilution of an individual's vote by mandating that the power of his or her vote . . . be equalized to the greatest degree possible with all other [] citizens." *League of Women Voters of Pa.*, 178 A.3d at 817. That is, after all, the meaning of "equal influence." *Cothran*, 189 S.C. 85, 200 S.E. at 97. Given the analogous constitutional provision and well-reasoned test announced in *League of Women Voters of Pa.* and its progeny, this Court should apply a similarly robust test here and rule that the congressional redistricting plan—which "made a mockery" of neutral redistricting criteria, *Alexander*, 649 F. Supp. 3d at 190, intentionally entrenches an artificial Republican advantage, and disproportionately wastes the votes of thousands of Democratic voters in South Carolina—violates the South Carolina Free and Open Elections Clause and its command that every voter be afforded "equal influence" in elections.

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B. Respondents' partisan gerrymander also violates South Carolina's Equal Protection Clause.

The South Carolina Constitution provides that "[t]he privileges and immunities of citizens . . . shall not be abridged . . . nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3. Under the Equal Protection Clause, if a law disfavors certain protected classes of people or impinges on a "fundamental" right, such as "the right to vote," the law is subject to "heightened scrutiny." *Sojourner v. Town of St. George*, 383 S.C. 171, 176, 679 S.E.2d 182, 185 (2009). Strict scrutiny requires the state to show that the law "meet[s] a compelling state interest and [is] narrowly tailored to effectuate that interest." *Planned Parenthood I*, 438 S.C. at 237, 882 S.E.2d at 796 (quoting *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140–41, 568 S.E.2d 338, 347 (2002)). Acknowledging the heavy burden to overcome heightened scrutiny, this Court has

explained that "[r]estrictions on the right to vote on grounds other than residence, age, and citizenship [will] generally violate the Equal Protection Clause." *Sojourner*, 383 S.C. at 176, 679 S.E.2d at 185.

An intentional partisan gerrymander, whereby the General Assembly rigs electoral district boundaries to benefit one group of voters over another, burdens "'the right of suffrage . . . by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the . . . franchise.'" *Burriss v. Anderson Cnty. Bd. of Educ.*, 369 S.C. 443, 451, 633 S.E.2d 482, 486 (2006) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). Accordingly, heightened scrutiny applies, and the redistricting plan cannot possibly survive. Even setting aside the plainly inadequate tailoring of the maps to advance any legitimate interests, Respondents have repeatedly admitted that their goal was to effectuate precisely the partisan outcome forbidden by the Equal Protection Clause here.[26] Perhaps it goes without saying, but "trying to create disparate treatment for the purpose of entrenching political power" is not a compelling interest.

Importantly, Petitioner's Equal Protection Clause claim is invited—not foreclosed—by the U.S. Supreme Court's decision in *Rucho*. *See infra* Part II.C; *Rucho*, 588 U.S. at 719 (holding Fourteenth Amendment lacks judicially manageable standards for policing partisan gerrymandering but noting "state constitutions can provide standards and guidance for state courts to apply"). When it comes to the South Carolina Equal Protection Clause, this Court is the final and ultimate authority. *S.C. Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278. And "[t]here is no reason to think . . . that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words,

[26] Having already benefited from that position, Respondents are judicially estopped from changing tack now. *See Cothran v. Brown*, 357 S.C. 210, 215–16, 592 S.E.2d 629, 631–32 (2004) (judicial estoppel "prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding").

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must be construed the same." Jeffrey S. Sutton, *What Does-and Does Not-Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 707 (2011).

Here, there are strong grounds for diverging from federal precedent. Although the text of Article I, Section 3, mirrors the federal Equal Protection Clause, the South Carolina Constitution's many unique and independent commitments to suffrage and democracy demand that its Equal Protection Clause be construed as *more protective* of fair elections than its federal counterpart. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 210–12 (Mo. 2006) (striking down voter ID requirement under Missouri's equal protection clause, Mo. Const. art. I, § 2, and "free and open" elections clause, Mo. Const. art. I, § 25) ("Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1370–71 (Alaska 1987) (holding that reapportionment plan violated state, but not federal, equal protection clause); *see generally* Antonin Scalia & Bryan Garner, READING LAW 167 (2012) (underscoring importance of reading document as a whole).

Grisham v. Van Soelen, 539 P.3d 272 (N.M. 2023), provides an instructive example. There, the New Mexico Supreme Court was forced to determine whether extreme partisan gerrymandering violated its Constitution. *Id.* at 281–84. In distinguishing its textually identical Equal Protection Clause from the analogous federal right at issue in *Rucho*, the court explained that the State's provision must be "read . . . together with" New Mexico's Popular Sovereignty Clause, Right of Self-Government Clause, and Freedom of Elections Clause. *Id.* at 283; *see also id.* at 289 ("[O]ur Constitution contains provisions . . . with no federal counterpart."). Rather than treating those rights as standalone causes of action, the court routed those protections through the state Equal Protection Clause, applied intermediate scrutiny, and adopted a three-part test for adjudicating partisan gerrymandering claims. *Id.* at 289 (rooting its holding in the Equal Protection Clause but explaining that "[w]e find it inconceivable that the framers of our constitution would

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consider an election in which the entrenched party effectively predetermined the result to be an election that is 'free and open.'" (referencing N.M. Const. art. II, § 8)). The court explained its three-part test, which it borrowed from Justice Kagan's *Rucho* dissent:

> In an egregious partisan gerrymandering claim, evidence of disparate treatment sufficient to establish a violation of the New Mexico Equal Protection Clause must prove under intermediate scrutiny that [1] the predominant purpose . . . was to entrench the redistricting political party in power through vote dilution of a rival party; [2] that individual plaintiffs' rival-party votes were . . . substantially diluted by the challenged map; and, [3] upon those showings, that the State cannot demonstrate a legitimate, nonpartisan justification for the [] map.

Id. at 293 (enumeration added).

The South Carolina Constitution, like New Mexico's, manifests a deep commitment to voting and representative democracy. Like New Mexico's, it creates mandatory and enforceable rights to Popular Sovereignty and Free and Open Elections. S.C. Const. art. I, § 1 ("All political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government"), *id.* § 5 ("All elections shall be free and open, and every inhabitant of this State . . . shall have an equal right to elect officers"). But our Constitution doesn't stop there—it also protects "the free exercise of the right of suffrage," S.C. Const. art. II, § 2, and mandates that the right of suffrage be protected from "all undue influence from power, bribery, tumult, or improper conduct," *id.* § 1.

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Further, just as the New Mexico Equal Protection Clause must be "read . . . together with" its substantive commitments to representative democracy, *Grisham*, 539 P.3d at 283, so must the South Carolina Equal Protection Clause be construed in light of South Carolina's independent constitutional commitments to achieving representational democracy, S.C. Const. art. I, § 1, through free and open elections, *id.* § 5, in which every voter has an "equal right to elect officers," *id.*, and no vote is swayed or diluted by official state power, improper conduct, or influence, S.C. Const. art. II, §§ 1, 2. *See, e.g.*, *Riley v.*

Charleston Union Station Co., 71 S.C. 457, 487, 51 S.E. 485, 488 (1905) ("[T]he fundamental principle . . . is that a Constitution must be considered as a whole."); *Gaud v. Walker*, 214 S.C. 451, 476, 53 S.E.2d 316, 327 (1949) ("All sections of the Constitution must be considered together.").

Given our Constitution's explicit pro-democracy guarantees, this Court should rule that extreme partisan gerrymandering violates voters' right to "equal protection of the laws." S.C. Const. art. I, § 3. Even if the Court disagrees that its existing precedent compels the application of strict scrutiny, *see Sojourner*, 383 S.C. at 176, 679 S.E.2d at 185, it should, at minimum, adopt and apply the three-part test used elsewhere to prevent partisan gerrymandering, *see, e.g.*, *Grisham*, 539 P.3d at 293 (describing the 3-part test as a form of "intermediate scrutiny"); *see also Rucho*, 588 U.S. at 722 (Kagan, J., dissenting) ("[C]ourts across the country . . . have coalesced around manageable judicial standards to resolve partisan gerrymandering claims."). As demonstrated here, this test provides workable standards for evaluating redistricting plans. Far from requiring unmoored policy determinations, this test asks the Court to evaluate Petitioner's evidence that the Legislature *intended* to gerrymander the congressional redistricting plan in favor of their political party (as they have repeatedly admitted they did) and then consider whether the plan *actually* creates extreme partisan bias and disparate electoral influence (it does).[27] Because the evidence shows that Petitioner carries its burden under heightened or

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[27] Myriad tools and metrics exist for quantifying redistricting bias, *see supra* Part I.A.2., but the Court need not develop *per se* rules to determine how much bias or disparate influence is permissible. The law is replete with flexible yet administrable tests. *See infra* Part II.C; *see also, e.g.*, *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (evaluating reasonableness of a *Terry* stop under the "totality of the circumstances"). Most states have declined to adopt specific thresholds for unconstitutional bias. *See, e.g.*, *Graham*, 684 S.W.3d at 683–84 ("While partisan redistricting resulting in a more significantly disparate outcome might rise to a level of constitutional infirmity, we need not resolve today precisely what level of disparate result would warrant such a finding [of unconstitutional bias].").

intermediate scrutiny, the congressional redistricting plan must be struck down under S.C. Const. Article I, Section 3.

C. Respondents' partisan gerrymander intentionally burdens political speech and association based on the voter's viewpoint.

Article I, Section 2 of the South Carolina Constitution prohibits any law "abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances." Given the similarities between the First Amendment of the U.S. Constitution and the language of Article I, Section 2, *Hunt v. McNair*, 258 S.C. 97, 103, 187 S.E.2d 645, 658 (1972), this Court has generally recognized that Article I, Section 2 is at least as protective as the First Amendment, *see, e.g.*, *Charleston Joint Venture v. McPherson*, 308 S.C. 145, 151 n.7, 417 S.E.2d 544, 548 n.7 (1992).[28]

Casting a ballot, participating in the political process, and associating with a political party are unmistakably expressive and communicative conduct that is protected by Article I, Section 2. Indeed, until *Rucho* held that partisan gerrymandering claims were not justiciable in federal court, it was well understood that partisan gerrymandering implicates the "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment). Put differently, "significant 'First Amendment

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[28] The Court has rarely addressed claims brought under Article I, Section 2. *See* 19 S.C. Jur. Constitutional Law § 50 (finding "only 22 . . . cases" where the Court addressed Article I, Section 2). To counsel's knowledge, the Court has never engaged with whether—in the context of viewpoint discrimination or voting—Article I, Section 2 should be construed as providing greater protections than the First Amendment. The Court's prior decisions conflating Article I, Section 2 with the First Amendment seem to lean on a cursory, 3-paragraph letter from the South Carolina Attorney General in 1977. *See Charleston Joint Venture*, 308 S.C. at 151 n.7, 417 S.E.2d at 548 n.7 (citing 1977 S.C. Op. Atty. Gen. No. 7729).

concerns arise' when a State purposely 'subject[s] a group of voters or their party to disfavored treatment.'" *Gill v. Whitford*, 585 U.S. 48, 80 (2018) (Kagan, J., concurring) (alteration in original) (quoting *Vieth*, 541 U.S. at 314); *see also Rosenberg v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

These principles are as sensible post-*Rucho* as they were before it. "[P]artisan gerrymanders subject certain voters to 'disfavored treatment' . . . counting their votes for less . . . because of "their voting history [and] their expression of political views." *Rucho*, 588 U.S. at 731 (Kagan, J., dissenting) (quoting *Vieth*, 541 U.S. at 314). Further, "added to that strictly personal harm is an associational one. Representative democracy is 'unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.'" *Id.* at 731–32 (Kagan, J., dissenting) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). So "[b]y diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness." *Id.* (Kagan, J., dissenting).

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The *Rucho* majority did not address this federal First Amendment rationale; instead, it ultimately rejected plaintiffs' partisan gerrymandering claims as beyond the authority of federal courts to resolve and thus nonjusticiable. Because *Rucho*'s rejection of partisan gerrymandering did not rest on substantive limits on what the First Amendment protects, this Court is free to recognize a claim under Article I, Section 2, for partisan gerrymandering here, even if it views that provision as coextensive with federal law. *See infra* Part II.C.

But even setting *Rucho* aside, there is no reasoned basis to construe Article I, Section 2 in lockstep with federal First Amendment jurisprudence. Doing so disregards the "fundamental principle" that "a Constitution must be considered as a whole." *Riley*, 71 S.C. 457, 51 S.E. at 488. And given the South Carolina Constitution's multiple

commitments to "free and open" elections that are protected "from all undue influence" and where voters exercise "equal influence" over elections, *see supra* Part I.A., it makes far better sense to construe Article I, Section 2 to establish strong protections against viewpoint discrimination within the context of voting and electoral influence. Reflexively adhering to the U.S. Supreme Court's interpretation of the First Amendment not only disregards this State's unique constitutional commitments, but it also eschews the Court's role within the Nation's cooperative federalist structure.[29]

South Carolina's congressional plan deliberately amplifies the voting power of Republicans and intentionally suppresses the voting power of Democrats. That is exactly the sort of viewpoint discrimination this Court should rule is condemned by Article I, Section 2.

D. Respondents' partisan gerrymander fails to respect county boundaries.

The South Carolina Constitution provides that "[e]ach County shall constitute one election district," S.C. Const. art. VII, § 9, and that "[t]he General Assembly may at any time arrange the various Counties into . . . Congressional Districts," *id.* § 13. These provisions reflect a twice-enshrined constitutional commitment to preserving county boundaries. In the redistricting context, federal courts have held that these provisions reflect "a substantial state policy favoring drawing congressional districts along county

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[29] Jeffrey S. Sutton, *What Does-and Does Not-Ail State Constitutional Law*, 59 U. Kan. L. Rev. 687, 707 (2011) ("There is no reason to think . . . that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same."); *see also* Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1311–13 (2017) ("When state courts depart from federal precedent, it may be because a state's distinct constitutional text or history points to a different result, and state courts should look first to state-specific sources in deciding an issue of state constitutional law. But when there is no state-specific text or history to guide the analysis, it is no embarrassment for a state court to disagree with federal precedent on the basis of constitutional reasoning that transcends state boundaries.").

boundaries," *Riley*, 533 F. Supp. at 1180, and that "preserving county lines should enjoy a *preeminent role* in South Carolina's redistricting process," *Sheheen*, 793 F. Supp. at 1341 (emphasis added).

At times, the state constitutional preference for preserving county boundaries must yield to superseding federal law, such as the 1-person-1-vote (1P1V) principle of *Wesberry v. Sanders*, 376 U.S. 1 (1964) (the rule that each person have roughly equal voting power, requiring that congressional districts must be approximately equal in population). *See Riley*, 533 F. Supp. at 1180 (noting the unlikelihood that drafters of Section 13 would have foreseen the 1P1V principle). That said, our Constitution's respect for county boundaries does not permit counties to be split "unless there [is] good reason for it." *Id.*

Partisan gain cannot justify discarding constitutional reapportionment priorities. Examples in other states are instructive. Like South Carolina, Maryland prefers to keep counties and other political subdivisions whole. Specifically, Article 3, Section 4 of the Maryland Constitution requires that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions." And while "due regard" "cannot overcome constitutional considerations," *Legis. Redistricting Cases*, 629 A.2d 646, 667 (Md. 1993), it still "acts as a deterrent to the gerrymandering of legislative districts," *In re 2012 Legis. Districting*, 80 A.3d 1073, 1091 (Md. 2013). As Maryland courts have explained, "if in the exercise of discretion, political considerations and judgments result in a plan . . . with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained." *In re Legis. Districting of State*, 805 A.2d 292, 326 (Md. 2002).

Here, there was no "good reason" for the congressional redistricting plan to split 10 counties. *Riley*, 533 F. Supp. at 1180. Simulations prepared by Drs. Mattingly and Herschlag show there are thousands of alternative maps that comply with federal law and neutral redistricting criteria but split fewer counties than the congressional redistricting plan. Indeed, out of the 84,907 plans produced in a Mattingly-Herschlag ensemble, 78,868 (approximately 93%) split fewer counties than the enacted plan. Not only does the

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congressional redistricting plan needlessly split counties—it does so to accomplish overt partisan ends. During the public input phase of the legislative process, numerous community members from Charleston, Richland, and Sumter Counties told lawmakers that they wanted their counties united into a single congressional district. *See* Compl. ¶¶ 75–79. Despite receiving publicly submitted plans that split fewer counties overall *and* accommodated those public requests (including the plan submitted by Petitioner LWVSC), lawmakers enacted a plan that needlessly deepened those splits to facilitate their partisan ambitions.

Preservation of county boundaries is not inviolate. Splitting counties is sometimes needed to ensure equipopulation or to draw districts that comply with Section 2 of the federal Voting Rights Act. But if "preserving county lines" is to "enjoy a *preeminent role* in South Carolina's redistricting process," then it cannot be subordinated to anti-democratic goals like partisan gerrymandering. *Sheheen*, 793 F. Supp. at 1341 (emphasis added). By needlessly severing counties to achieve an artificial partisan advantage, Respondents violated the commands of Article VII, Sections 9 & 13 of the South Carolina Constitution.

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II. Petitioner's claims are justiciable.

"It is well settled that the interpretation of the state's constitution is a matter for the courts." *Baddourah v. McMaster*, 433 S.C. 89, 103, 856 S.E.2d 561, 568 (2021). When the Court interprets the Constitution, it does so "to ensure South Carolinians retain the rights it guarantees." *Planned Parenthood I*, 438 S.C. at 232, 882 S.E.2d at 794 (Beatty, C.J., concurring).

Here, the Constitution requires the Court to decide whether extreme partisan gerrymandering violates its terms. *See Segars-Andrews v. Jud. Merit Selection Comm'n*, 387 S.C. 109, 123, 691 S.E.2d 453, 460–61 (2010). Plaintiffs do not ask the Court to try its hand at redistricting (a task constitutionally assigned to the Legislature), but to review the

constitutionality of the congressional redistricting plan. To do so, the Court need not "scal[e] the walls that separate law making from judging," *Abbeville Cnty. Sch. Dist. v. State*, 410 S.C. 619, 664, 767 S.E.2d 157, 181 (2014) ("*Abbeville II*") (Kittredge, J., dissenting), or "create[] rights and duties out of thin air," *id.*; rather, the Court need only engage in core judicial functions: interpret the Constitution, ascertain the scope of its rights and protections, and apply those mandates to a statute—here, the congressional redistricting plan. Because the task is uniquely judicial and does not encroach on "a coequal branch of government," *S.C. Pub. Int. Found.*, 369 S.C. at 142–43, 632 S.E.2d at 278, "this Court is duty bound to review the actions of the Legislature," *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

A. Judicial review of legislative action is a core function of the judicial branch.

"A Constitution is the permanent will of the people, is the supreme law, and paramount to the power of the Legislature." *Davenport v. Caldwell*, 10 S.C. 317, 327 (1878). As Chief Justice Marshall famously explained, "if the Constitution does not control a legislative Act repugnant to it, then the Legislature may alter the Constitution by an ordinary Act." *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 138 (1803)). This Court has recognized its solemn responsibility to review the constitutionality of legislative actions:

> "[I]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 138 [] (1803). This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws.

Abbeville II, 410 S.C. at 632, 767 S.E.2d at 163–64. As one of its most fundamental and sacred functions, "this Court is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional." *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

The scope and limits of judicial review derive from the Constitution. When a case presents a question of statutory or constitutional interpretation, the Court is duty bound to

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answer. *Id.* For just as the Constitution prohibits the Legislature from both enacting and enforcing legislation, *see Knotts v. S.C. Dep't of Nat. Resources*, 348 S.C. 1, 7, 558 S.E.2d 511, 514 (2002), it also precludes the Legislature from deciding whether its own actions are constitutional. The same constraint applies to the Governor and the executive branch. *Baddourah*, 433 S.C. at 103, 856 S.E.2d at 568 ("[T]he Governor's exercise of his suspension power is . . . left to his sole discretion. . . . [D]efining terms used in the state's constitution is not."). Interpreting the State Constitution is a matter reserved for the courts. *Id.*; *see also State v. Ansel*, 76 S.C. 395, 405, 57 S.E. 185, 189 (1907) ("[E]ach [branch] is supreme as to matters within its own sphere of action.").

The judiciary's interpretation and enforcement of constitutional limits on the executive and legislative branches is a vital aspect of the Constitution's "checks, and balances." *Ansel*, 76 S.C. 395, 57 S.E. at 189. As former Chief Justice Toal wrote:

> "Checks and balances" is not just an abstract phrase, but describes a set of concrete governmental arrangements allowing each branch of government to discharge its responsibilities without infringing on those of another branch. One of these arrangements is judicial review of certain executive and legislative actions. . . .

Newman v. Richland Cnty. Historic Pres. Comm'n, 325 S.C. 79, 480 S.E.2d 72, 76 (1997) (Toal, J., dissenting).

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Finally, to determine whether a claim is justiciable, the Court considers "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Segars-Andrews*, 387 S.C. at 122, 691 S.E.2d at 460. That said, "difficulty in determining the precise parameters of constitutionally acceptable behavior . . . does not necessarily signify that courts cannot determine when a party's actions . . . fall outside the boundaries of such constitutional parameters." *Abbeville II*, 410 S.C. at 632, 767 S.E.2d at 163. *See, e.g.*, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (explaining that though 'obscenity' "may be indefinable, . . . I know it when I see it")).

B. South Carolina courts recognize only a narrow class of cases that present nonjusticiable political questions, and this is not one of them.

Unlike the federal political question doctrine, which arises from Article III of the U.S. Constitution, this state's doctrine flows from the Separation of Powers Clause. *S.C. Pub. Interest Found.*, 369 S.C. at 142, 632 S.E.2d at 278; *see* S.C. Const. art. I, § 8. At its core, this Court's political question doctrine prohibits the Court from encroaching on matters explicitly reserved to other branches of government. *See Abbeville II*, 410 S.C. at 665, 767 S.E.2d at 181 (Kittredge, J., dissenting) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to [a political branch], can never be made in this court." (quoting *Marbury*, 5 U.S. at 170)). In this Court's words, "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government." *Gantt v. Selph*, 423 S.C. 333, 339 (2018) (quoting *S.C. Pub. Interest Found.*, 369 S.C. at 142–43, 632 S.E.2d at 278). But importantly, the Court has always been careful to distinguish between "political *cases*," which are justiciable, and "political *questions*," which are not. *Alexander v. Houston*, 403 S.C. 615, 619, 744 S.E.2d 517, 519 (2013) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); *see, e.g.*, *Planned Parenthood I*, 438 S.C. at 257–58, 882 S.E.2d at 807–08 (Few, J., concurring) ("[W]e confront purely legal questions . . . [that] are related to—but not the same as—political questions before the 124th General Assembly."); *Planned Parenthood S. Atl. v. State*, 440 S.C. 465, 496, 892 S.E.2d 121, 139 (2023) ("*Planned Parenthood II*") (Few, J., concurring) ("[T]he regulation of abortion is . . . . [a] legal question only to the extent that any restriction on abortion may clearly violate a specific constitutional provision.").

This Court rarely declines review under its political question doctrine. Its precedent shows a firm commitment to the "critical and necessary judicial functions" of "interpretation of the law" and "evaluat[ing] the government's acts pursuant to that law," even when the text of the law creates "difficulty in determining the precise parameters of

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constitutionally acceptable behavior." *Abbeville II*, 410 S.C. at 632–33, 767 S.E.2d at 163–64. It is only under the narrowest of circumstances that the Court denies review—for example, when a case requires the Court to engage in conduct explicitly assigned to a different branch of government, *e.g.*, *Stone v. Leatherman*, 343 S.C. 484, 484–85, 541 S.E.2d 241 (2001) (holding that the Senate has exclusive constitutional authority to judge election returns and qualifications of its own members); *S.C. Pub. Interest Found.*, 369 S.C. at 143, 632 S.E.2d at 279 (denying review over qualifications for judicial appointment where "the State Constitution, in unequivocal terms, vests the power to determine the qualifications for judicial candidates in the General Assembly"), or when plaintiffs bring only "implicit argument[s] as to what the law should be," *Bailey v. S.C. State Election Comm'n*, 430 S.C. 268, 275, 844 S.E.2d 390, 394 (2020). No such circumstances apply here.

C. Partisan gerrymandering is justiciable under the South Carolina Constitution.

There is no redistricting exception to judicial review. The congressional redistricting plan is a legislative act that, like all others, must abide by the mandates and limits of the South Carolina Constitution. *See* S.C. Const. art. I, § 23 ("provisions of the Constitution shall be . . . mandatory and prohibitory"); *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963) ("[A]ll sections of the Constitution must be considered together[.]"). As with all laws, the plan is a joint enterprise between the legislative and executive branches. The Legislature drafted, debated, and passed bills that reapportioned electoral districts. The Governor signed those bills into law and is responsible, through the State Election Commission, for their enforcement.[30] But it remains the Court's duty to

[30] South Carolina treats the redistricting process like ordinary lawmaking, but that is not true of all states. *See* Kniaz & Shields, *Redistricting: The Road to Reform* at 8–9, Center on the American Governor (May 2021), available at https://governors.rutgers.edu/governors-and-the-redistricting-process/ (some state

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resolve Plaintiffs' "properly filed suit that such actions are unconstitutional." *Segars-Andrews*, 387 S.C. at 123, 691 S.E.2d at 460–61.

To address the elephant in the room: This case isn't controlled by *Rucho*. In *Rucho*, a thin majority of the U.S. Supreme Court held that partisan gerrymandering claims brought under the *federal* Constitution are "beyond the reach of the *federal* courts." 588 U.S. at 718 (emphasis added). Writing for the Court, Chief Justice Roberts explained that the federal Constitution does not provide judicially manageable standards to adjudicate claims of partisan gerrymandering. *Id.* at 716–17. Lacking a textual basis "to guide the exercise of judicial discretion," the Court ruled those claims nonjusticiable. *Id.* But just because the federal courts cannot adjudicate partisan gerrymandering claims, doesn't mean that such claims are nonjusticiable in *state* courts. *See* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 913 (2021) (explaining why "Supreme Court's invocation of state constitutions in *Rucho* should not be read as mere hand-waving"). To the contrary, *Rucho* embraced the possibility that "[p]rovisions in state statutes and state constitutions *can* provide standards and guidance for state courts to apply." *Rucho,* 588 U.S.. at 719.

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Beyond the nonbinding nature of its ruling, there are at least two other reasons why this Court should decline to follow the reasoning of *Rucho* here.

First, *Rucho*'s holding rested entirely on concerns about judicial administrability that have no place in this Court's political question jurisprudence. To Petitioner's knowledge, this Court has never denied review for lack of judicially manageable standards.

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legislatures use an advisory commission, while other states have political appointee commissions or independent commissions). In North Carolina, for example, the legislature passes state and federal maps as regular legislation, but the governor is expressly *denied* veto power over those maps. N.C. Const. Art. II, § 22(5); *Harper v. Hall*, 384 N.C. 292, 331, 886 S.E.2d 393, 419 (2023) ("[B]oth our constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches.").

Nor should it; law libraries are replete with tests developed to assess adherence to important, if imprecise, principles. *See, e.g.*, *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246–47 (1990) (voluntariness of confession based on totality of circumstances); *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (*Terry* stop evaluated under totality of circumstances); *see also Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari) (discussing "tripartite binary test with a sliding scale and a reasonable fit" developed to address Second Amendment claims). If the text of the Constitution creates a right, then courts must develop standards to enforce it. *See League of Women Voters of Utah v. Utah State Legislature*, 554 P.3d 872, 913 (Utah 2024) (discussing justiciability of partisan gerrymandering claims) ("[T]he question simply cannot be whether the rule is difficult to apply or whether we might wish for a clearer one. We look instead for whether the provision sets out a rule at all; if it does, we do our best to apply it.").

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Second, Petitioner's claims are tethered to specific constitutional guarantees and are judicially administrable. Unlike *Rucho*, this case does not require the Court to make an "unmoored determination" about what is "fair" in redistricting, 588 U.S. at 707, but to apply settled constitutional principles. Unlike the plaintiffs in *Rucho*, Petitioner's claims flow from the State Constitution's textual guarantee of "free and open" elections, where every voter has "an equal right *to elect* officers." S.C. Const. art. I, § 5 (emphasis added). Stronger still, this Court has construed that guarantee (which lacks a federal analogue) to require that "every elector" be "granted *equal influence* with that of every other elector." *Cothran*, 189 S.C. 85, 200 S.E. at 97 (emphasis added). Petitioner also invokes the State's Equal Protection Clause, where the Court has explained that the "debasement or dilution of the weight of a citizen's vote" is "as nefarious as an outright prohibition on voting." *Burriss*, 369 S.C. at 451, 633 S.E.2d at 486 (citations omitted); *see supra* Part I.B. (explaining why Article I, Section 3 must be "construed as *more protective* of fair elections than its federal counterpart"). Together, these constitutional guarantees announce a clear

and manageable standard: the state must ensure citizens are afforded "equal influence" over elections. *See Rucho*, 588 U.S. at 720 (citing, as a manageable standard, Mo. Const. art. III, § 3, which mandates that voters "shall be able to translate their popular support into legislative representation with approximately equal efficiency").[31]

Turning from *Rucho* back to this Court's own precedents, it is again clear that partisan gerrymandering does not present a non-justiciable political question. For example, this case is much simpler than the Education Clause claim that this Court recognized in *Abbeville*. There, the Court interpreted Article XI, Section 3 of the State Constitution—which commands the General Assembly to "provide for the maintenance and support of a system of free public schools open to all children in the state"—to contain an implicit right to a "minimally adequate" education. *See Abbeville II*, 410 S.C. at 626–27, 767 S.E.2d at 160–61 (discussing *Abbeville Cnty. Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999) ("*Abbeville I*")). The Court then went on to define "minimally adequate" as including the right to "adequate and safe facilities," and the opportunity to acquire "the ability to read, write, and speak the English language," the "knowledge of mathematics and physical science," and a "fundamental knowledge of economic, social, and political systems, and of history and governmental processes." *Id.* (quoting *Abbeville I*, 335 S.C. at 68–69, 515 S.E.2d at 540).

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Admittedly, *Abbeville* was not without its critics. The dissent in *Abbeville II*, for example, characterized the phrase "minimally adequate education" as "purposely ambiguous, objectively unknowable, and unworkable in a judicial setting." 410 S.C. at 665, 767 S.E.2d at 181 (Kittredge, J., dissenting). But a partisan gerrymandering claim is far more amenable to adjudication by this Court because it is more closely tethered to the

[31] Petitioners expect no argument over whether viewpoint discrimination is justiciable or not. Likewise, if the Constitution prohibits unnecessary county splits during redistricting, then there can be no real dispute over whether the judiciary must adjudicate those claims. *See, e.g.*, *In re Legis. Districting of State*, 805 A.2d at 326.

constitutional text, governed by more pre-existing precedents of this Court, and is far more amenable to judicial identification, determination, and application. No one asks that the Court act as a "super-legislature" over any area of policy; this case only requires the Court to adopt a standard for determining when a redistricting plan violates the "equal right to elect officers" guaranteed to all South Carolina voters, S.C. Const. art. I, § 5; selectively infringes on the fundamental right to vote, *id.* § 3; suppresses political speech based on the speaker's viewpoint and party association, *id.* § 2; or needlessly splits county boundaries without a compelling interest, S.C. Const. art. VII, §§ 9, 13.

D. The consequences of declining review are dire.

Finally, the Court ought to weigh the consequences of inaction. Unlike other states, South Carolina doesn't recognize any form of direct democracy. Rather, "Article III, § 1, of the South Carolina Constitution provides for a representative form of government in this state as opposed to a direct democracy." *Joytime Distribs. & Amusement Co.*, 338 S.C. at 642, 528 S.E.2d at 651. As a result, voters can only achieve their policy preferences through elected representatives—who, in turn, have a deep self interest in configuring electoral districts in a manner that entrenches their power and reduces their political accountability. *Cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (Scalia, J., concurring in part and dissenting in part) ("The first instinct of power is the retention of power.").

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Should this Court deem the Legislature's ability to gerrymander nonjusticiable and unreviewable, South Carolina legislators will have *carte blanche* to manipulate the democratic process and dilute the voting power of South Carolina's citizens in violation of the Constitution's promises, thereby entrenching themselves in positions of power. And South Carolina's citizens will have no recourse, as their voting power will be diminished by the very actions the Court deemed too political to adjudicate. Indeed, in the case of extreme political gerrymandering, this Court stands as the last bastion against unchecked legislative tyranny.

CONCLUSION

This case is consequential, but simple. As Justice Gorsuch noted at oral arguments in *Alexander*, we must "take as a given" that the South Carolina congressional redistricting plan is a partisan gerrymander. Starting there, the only question is whether partisan gerrymandering violates the South Carolina Constitution. Because the text, history, and purpose of the Constitution prohibit laws that intentionally dilute or nullify the influence of voters, that treat similarly situated voters disparately, that suppress free expression based on a voter's political views and affiliations, and that unnecessarily split up counties, Petitioner is entitled to relief.

Respectfully submitted,

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